Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

GABRIELE OMLIN,

Petitioner,

v.

KAUFMAN & CUMBERLAND L.P.A.,

Respondent.

On Petition for Writ of Certiorari to the Unites States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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6300

QUESTIONS PRESENTED

1. Whether a state statute of limitations for legal malpractice should be tolled until the underlying adverse decision is affirmed on appeal and an injury in fact and the standing to sue is established?

2. Whether federal courts should adopt an intermediate state court decision and grant a law firm, incorporated as legal professional association, immunity from being sued for breach of written contract, breach of fiduciary duty, fraud, negligence, and infliction of emotional distress?

3. Whether a properly amended complaint and court certified copies of state courts' proceedings and an opposing affidavit supported by copies of the business record are material of the type specified under Fed. R. Civ. P. 56(c) to be considered in determining whether to grant judgment as a matter of law?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The order of the Court of Appeals for the Sixth Circuit which is not reported, appears as Appendix A to this petition.

The memorandum and order of the District Court granting Respondent's motion for summary and denying Petitioner's cross-motion for summary judgment as a matter of law, which is not reported, appears as Appendix B to this petition.

The order of the Court of Appeals denying Petitioner's motion for rehearing and rehearing en banc, which is not re-ported, appears as Appendix C to this petition.

JURISDICTION

The decision of the Court of Appeals was entered on May 1, 2001. A timely petition for rehearing and a suggestion for rehearing en banc were denied on June 29, 2001. Jurisdiction of this Court exists under 28 U.S.C. 1254(1). The District Court had jurisdiction under 28 U.S.C. 1332(a)(2). The Court of Appeals had jurisdiction under 28 U.S.C. 1332(a)(2).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Clause 1, of the United States Constitution providing in pertinent part:

> "No State shall .... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts..."

The "injury-in fact" and "ripeness" doctrine as standing requisite contained in Article III, Section 2, of the United States Constitution.

Article IV, Section 1, of the United States Constitution providing in pertinent part:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Seventh Amendment to the United States Constitution, providing in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The Fourteenth Amendment to the United States Constitution, providing in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit, § 2 and § 3:

> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Fed. R. Civ. P. 56(c) Motion and Proceedings Thereon.

> ***The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interroga-tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ***"

STATEMENT OF THE CASE

History of the Case

Petitioner, Gabriele Omlin, a Swiss citizen residing in Switzerland, brought this suit against Respondent, Kaufman & Cumberland Co. L.P.A., a legal professional association incorporated in Cleveland, Ohio.

Petitioner was on an extended business visit in the United States from October 19, 1994 through April 12, 1996 as temporary alien under 8 U.S.C. §1101. During her stay she rented a home in Willoughby Hills, Lake County, Ohio. Shortly before she returned home, the landlord sued her alleging that he was denied inspections of the home. Before Petitioner returned home the matter was settled by agreement and the counterclaim withdrawn. In May 1996 Petitioner received a notice from the court that a trial was set for May 23, 1996 on damages and attorney fees. As the U.S. immigration law did not a allow a re-entering before October 1996, she informed the court that she could not attend the trial and that she could not find a new attorney. Instead she sent an affidavit denying to have caused any damages. On July 26, 1996 she received an adverse judgment entered on June 27, 1996; on July 27, 1996 Petitioner sent by fax a notice of appeal.

Petitioner's retaining Kaufman & Cumberland Co., L.P.A. was based on the express representation made by Mr. Frank J. Cumberland on August 2, 1996 on the occasion of a telephone conversation with Petitioner, and confirmed in the agreement signed by the parties on September 12, 1996, that it would be Mr. Cumberland who would provide the offered legal services in a timely and competent manner at a rate of $195 per hour, occasionally assisted by others. Petitioner had asked Frank J. Cumberland to look into the landlord matter

and to discover the brand of the industrial glue the landlord had used in the home during her stay and which caused a severe rash from which Petitioner suffered for about six months and which left her with permanent skin damages.

Contrary to the agreement Respondent did not provide the services of Mr. Cumberland, but subordinated the matter to students, associates and paralegals, who were inexperienced in the applicable laws and rules of procedure. In addition, those associates left the firm during their work and were frequently replaced by others so that nobody was really informed on the facts and the work of his predecessor.

Withholding the promised professional experience resulted in the dismissal of an appeal, in the dismissal of an untimely filed Rule 60(B) motion, and in the dismissal of the subsequent appeal.

One of the young attorneys recommended and filed a tort action in the Cuyahoga County court of common pleas seeking compensation for bodily injury caused by the industrial glue. When he left the firm, his successor declined a settlement offer from the opposing counsel without asking Petitioner. When the court threatened several times to dismiss the case for want of prosecution, the associate recommended to voluntarily dismiss the case, because he had failed for almost a year to discover from the plumber the brand of the glue used needed for the medical tests.

Proceedings below

On January 8, 1999 Petitioner filed her complaint in the U.S. District Court and attached a copy of the agreement. (Appendix D; Complaint. Appendix E; Contract. R.1[1];

[1] Record in the District Court

Complaint). The complaint asserted misrepresented competence, breach of contract, breach of fiduciary duty, negligence, misleading legal advise misleading status reports, unjustified enrichment, causing Petitioner monetary loss, mental anguish, pain and suffering.

It was Petitioner's full intention not to sue an individual attorney for malpractice. *First*, the reason for the unsuccessful legal work was the consequence of the breach of contract. *Second,* the young attorneys and other Respondent's staff were not employed by Petitioner, but assigned by Respondent. *Third,* Petitioner is not going to sue a young attorney and destroyhis or her career just because they were not experienced enough to do the work. *Fourth*, Respondent profited on every hour of its associates. *Fifth,* it is normal business standard that employers are liable for the work of their employees (master/slave doctrine).

On March 9, 1999, the Respondent answered the complaint (R. 4; Answer to Complaint). No counterclaim was filed. On July 1, 1999, following the production of documents by the Respondent and in compliance with the case management plan, the Petitioner filed an amended complaint (R. 15; Amended Complaint) answered by the Respondent on July 30, 1999 (R. 17; Answer to Amended Complaint).

On September 15, 1999, Petitioner filed a Motion for Sanctions pursuant to Fed. R. Civ. P. 11 (R.22; Motion for Sanctions). On September 29, 1999, the Respondent opposed the motion for sanctions (R. 24; Brief by Defendant). On October 18, 1999, the district court denied Petitioner's motion for sanctions "because it does not satisfy Rule 11 and is better made as an argument for Summary Judgment" (R. 28; Order).

On February 1, 2000, the Respondent filed a Motion for Summary Judgment (R. 37; Motion by Defendant for

Summary Judgment). On February 15, 2000, Petitioner filed an opposition to defendants motion for summary judgment (R. 39; Opposing Brief. R. 40; Affidavit). On February 22, 2000, the Respondent filed its reply (R. 41; Reply by Defendant).

On February 22, 2000, Petitioner filed her cross-motion for summary judgment (R. 42; Motion by Plaintiff for Summary Judgment with R. 43; R. 44; R. 45). On March 7, 2000, the Respondent filed an opposition (R. 46; Brief by Defendant). On March 14, 2000, Petitioner filed a reply (R. 47; Reply by Plaintiff. R. 48; Plaintiff's Exhibits).

On July 6, 2000, the district court granted without oral hearing the Respondent's Motion for Summary Judgment (R. 52; Memorandum & Order) and denied by a separate Order of the same date Petitioner's Motion for Summary Judgment and dismissed the case. On August 3, 2000 Petitioner filed a timely Notice of Appeal.

In her appeal brief Petitioner separately set out the following issues for review:

> "1. Whether the district court applied as a matter of law an improper standard when it granted summary judgment to Appellee by relieving Appellee from its initial burden to demonstrate that there is no genuine issue of fact to be tried.
>
> 2. Whether the district court erred as a matter of law in granting summary judgment to Appellee by failing to receive Appellant's amended complaint and basing its summary judgment on Appellant's original complaint.

3. Whether the district court erred as a matter of law in granting summary judgment to Appellee by concluding that Appellant's complaint is not a breach-of-express contract claim, breach of fiduciary duty claim, and a tort claim.

4. Whether the district court erred as a matter of law in denying the nonmoving Appellant the appropriate inferences and presumptions of the truth of her allegations.

5. Whether the district court erred as a matter of law in granting Appellee's motion for summary judgment, without finding that there is no genuine issue of fact.

6. Whether the district court erred as a matter of law and fact in granting summary judgment to Appellee by concluding that Appellant's action is time-barred.

7. Whether the district court erred as a constitutional matter in denying Plaintiff's motion for summary judgment, by discounting the state judgments". (Appellant's Brief page 9)

In her reply brief, Petitioner identified the following genuine issues of fact and law:

"1. Determination of the nature of the case on the analysis of the gist of Appellant's Original Complaint instead of Appellant's Amended Complaint.

2. Exclusive reliance on Cumberland's affidavit and on the law firm's argument that the termination of

the attorney-client relationship accrued on January 6, 1998, although contradicted by Appellant's affidavit supported by convincing evidence.

3. The accrual of the statute of limitations has to be explored and determined for each particular transaction, i.e. for the Cuyahoga County transaction and for the municipal court transaction.

4. The law firm's January 8, 1998 letter to Appellant and the law firm's invoice for the month of January 1998 demonstrate that: (a) Cumberland refused to withdraw as counsel and asked for further employment on both the Lake County and the Cuyahoga County case; (b) that on January 8, 1998 Cumberland gave Appellant still legal advice; (c) that the law firm's employee Webster resumed Appellant's outside representation as long as January 13, 1998 discussing discovery matters with the opposing counsel; The law firm charged Appellant for the letter of January 8, 1998 and for the all other time through January 14, 1998.

5. Appellant was not and could not be aware on January 5, 1998 that Cumberland's advice given on January 8, 1998 in the Cuyahoga County transaction on which Appellant relied was false. Appellant could discover the loss and injury only in December 1998, when she tried to refile the case.

6. The Lake County action was only filed on January 2, 1998. before December 14, 1998, Appellant could not be aware of the seriousness of her legal problems and of the serious loss and injury caused to her.

> 7. The law firm has sought summary judgment only on its own two issues and on none of the counts contained in Appellant's Amended Complaint; all 21 counts are genuine issues of fact and law on which Appellant has sought summary judgment with her cross-motion for summary judgment." (Appellant's Reply Brief pg. 7-9)

The order of the Court of Appeals shows that the court only reviewed issue 5 and none of the other assignments.

The footnotes in the District Court's memorandum (Appendix B), especially footnote 4 and 5 do not reflect the facts, but mirror the Respondent's motion for summary judgment.

In footnote 4 the District Court acknowledged that the latter argument is premised, in part, on the fact that Petitioner's own expert failed to find Respondent breached any duty it owed her as counsel.

In her opposing brief, Petitioner objected to the use of the affidavit of Respondent's expert as hearsay evidence, because this expert report was based on Petitioner's expert report and not on Respondent's expert own knowledge. With court certified copies of the underlying litigation Petitioner brought proof that several statements made by Respondent's expert under oath, were untrue. Respondent also took over Petitioner's expert and attached his report as evidence to Respondent's brief. Respondent could neither get from Petitioner's expert a sworn affidavit nor an unsworn statement subscribing the report as being true under penalty of perjury (28 U.S.C. § 1746). As this expert report did not comply with the requirements of § 1746, the facts averred to therein lacked the force and effect of an affidavit for purposes of moving for summary judgment. *See e.g. Zainalian v. Memphis Board of Education,* 2001 U. S. App.

LEXIS 2269; *Lavado v. Keohane,* 992 F.2d 601, 605 (6th Cir. 1993). To overcome this obstacle, Respondent played in its brief a question and answer game, with questions Petitioner's expert was never asked and with answers he had never given. In her opposing brief Petitioner objected this procedure and the evidence, and raised this issue on appeal. (Appeal Brief pg. 14)

The "treatment" by the landlord mentioned in footnote 5 is not the subject of this case, was never the subject of any case and the allegations are not supported by any evidence.

REASONS FOR GRANTING THE PETITION

1. The decision entered by the Court of Appeals for the Sixth Circuit is in conflict with the decisions of several other U.S. Courts of Appeals and with decisions of several state courts of last resort which held that the statute of limitations for legal malpractice actions is tolled until the underlying judicial process is finalized.

Granting the petition is especially justified by the conflicts among the circuits and the states, and the frequency with which these cases arise. Not tolling the limitations statute until the appeal is final encourages attorneys in states with only a one-year limitations period to hide mistakes from clients and file even meritless appeals, because attorneys have a good chance that injured clients have lost their right to remedy before the reviewing court announces its adverse decision.

In *Pioneer Inv. Servs. v. Brunswick Assocs.* (91-1695), 507 U.S. 380 (1993) this Court approved that clients can be held accountable for the acts and omissions of their attorneys, but it is silent on as whether this decision influences the application of state limitation periods.

The dissenting opinions mirror the difficulties judges in the U.S. Courts of Appeals and justices in the state courts of last resort across the country are facing when trying to reconcile the Equal Protection and Due Process clause under the Fourteenth and Second Amendments to the United States Constitution.

To cope with the situation, state courts, followed by the federal courts, have developed a whole array of different rules governing the application of limitations statutes with

regard to cases based on underlying litigation. Texas, Tennessee and Arkansas apply the "exhaustion of appeals rule", Illinois and Maryland apply the "[trial court] judgment rule", Virginia opted for the "payment rule"[of judgment].

Other states apply the "[injury] discovery rule" (Ohio, not all courts) or the "damage rule" (Alaska) no matter if there was underlying litigation or not.

In *Pope County v. Friday, Eldredge & Clark*, 313, Ark. 83, 852 S.W.2d 114 (1993) the Arkansas Supreme Court (applying the "exhaustion of appeals rule") held:

> "[A] putative plaintiff has no legal malpractice claim until an underlying adverse decision is affirmed on appeal because his or her damages are speculative until that point." *Id.* 115 (summarizing the court's prior holding in *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (Ark. 1989).

Using also the "exhaustion of appeals rule" in *Huges v. Mahaney & Higgins*, 821 S.W.2d 154, (1992) the Supreme Court of Texas held:

> "[W]here 'a person is prevented from exercising his legal remedy by pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his rights (citations omitted). *Id* at 157. *** A cause of action for legal malpractice accrues when the client sustains a legal injury or, in cases governed by the discovery rule, when the client discovers or should have discovered the facts establishing the elements of a cause of action (citations omitted) *** We conclude that the rationale applied in these

> cases is also appropriate when a client's cause of action for malpractice arises during the attorney's prosecution or defense of a claim which results in litigation. Limitations are tolled for the second cause of action because the viability of the second cause of action depends on the outcome of the first. Therefore, we hold that when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted. We join other jurisdictions in adopting this well-reasoned rule." (footnote and citations omitted). *Id.*

In *Parker Streber v. Hunter*, 221 F.3d 701 (2000) the U.S. Court of Appeals for the Fifth Circuit observed that "[I]n Texas, attorney malpractice claims are among the two types of claims that, because they are considered 'inherently undiscoverable' implicate an unlimited discovery rule" (citation omitted). *Id.*

Recently the undivided Supreme Court of Texas in *Apex Towing Company v. Tolin*, __ S.w.3d __ (Tex. 2001) reaffirmed the tolling rule announced in *Hughes*.

Under Arizona law, a legal malpractice claim that arises in the course of litigation accrues when two elements are met. First, the plaintiff must know or should reasonably have known of the legal malpractice. *Amfac Distrib. Corp. v. Miller*, 673 P.2d 795, 796 (Ariz.Ct.App.1983) ("*Amfac I*"). Second, the plaintiff's damages must be "certain and not contingent upon the outcome of an appeal." In *Taylor v. State Farm Mut. Auto. Ins. Co.*, 913 P.2d 1092, 1096-97 (Ariz.1996) the Supreme Court of Arizona restated:

> "[B]ecause the plaintiff's injury is uncertain until the appellate process concludes, by resolution of or failure to appeal, the malpractice action does not accrue until such time as the judgment in the underlying action becomes final."; *Amfac Distrib. Corp. v. Miller*, 673 P.2d 792 (Ariz.1983) *("Amfac II")* (approving the rule set forth in *Amfac I*); *Commercial Union Ins. Co. v. Lewis and Roca,* 902 P.2d 1354, 1359 (Ariz.Ct.App.1995) ("[I]n the context of litigation, attorney negligence is not actionable until the case in which the malpractice arose is finally resolved."). A case is no longer contingent upon the outcome of an appeal when the time for filing such appeal has passed or when the appellate court issues a mandate. See *Joel Erik Thompson Ltd. v. Holder*, 965 P.2d 82, 85 (Ariz. Ct.App.1995) (clarifying that a judgment becomes final when the appellate court decides the appeal and when the time to appeal to the state supreme court has expired)."

In *Porter v. Ogden*, 241 F.3d 1334, the U.S. Court of Appeals for the Eleventh Circuit examining a judgment entered by the U.S. District Court for the Middle District of Florida, found:

> "[U]nder Florida law, '[g]enerally, a cause of action for negligence does not accrue until the existence of a redressable harm or injury has been established and the injured party knows or should know of either the injury or the negligent act.' *Peat, Marwick, Mitchell & Co. v. Lane,* 565 So.2d 1323, 1325 (Fla.1990). When a plaintiff bases a malpractice action on errors committed in the course of litigation, and the litigation proceeds to judgment, the redressable harm is not established

until final judgment is rendered." *Id.* at 1339. *See Silvestrone v. Edell,* 721 So.2d 1173, 1175 (Fla.1998).

In *Kaplan v. Shure Brothers, Inc,* 153 F.3d 413 (1998) the U.S. Court of Appeals for the Seventh Circuit (interpreting Illinois law and the "[trial court] judgment rule") found:

> "[T]that Kaplan's malpractice against his former attorney Weinberg accrued when Kaplan 'knew or should have known, that the injury to him *** was wrongly caused by Weinberg *** when [the district] Court ruled [on the parallel claim against Shure] on July 17, 1996 and September 13, 1996.' *Id.* at 421 (what, however had no impact on the Circuit Court's decision, because the case was time-barred by the applicable statute of repose.)"

In *Fullerton v. Fahrenkopf Jr.*, 215 F.3d 1340 (1999) the U.S. Court of Appeals for the Federal Circuit held:

> "[I]n view of the January 8, 1992 written agreement, the applicable statute of limitations for any acts of malfeasance during these periods is five years (i.e., the statute of limitations for written contracts), and the filing of the complaint on November 7, 1996 is timely as to such acts, which appear to have been alleged." *Id* at 1342.

In *Allied Productions Virgina, Inc. v. Duesterdick*, 217 Va. 763, 232 S.E.2d 774 (1977). The Supreme Court of Virginia, over a vigorous dissent, applied the "payment rule":

> "[W]hen a client suffered a judgment for money damages as the proximate result of his lawyer's

> negligence such judgment constitutes actual damages recoverable in a suit for legal malpractice only to the extent such judgment has been paid" *Id.* at 766.

In his dissenting opinion Justice Proff criticized that the "payment rule" may result in: (a) immunity for the lawyer when the injured client cannot pay a huge adverse judgment in the underlying suit; (b) in flood of suits when the injured plaintiff makes partial payments and sues his lawyer after each partial payment; (c) in due process problems when the injured client's, after having paid the judgment and obtained the right to sue, is dismissed as coming too late.

In *Beesley v. Van Doren* (1994), 873 P.2d 1280, Alaska's Supreme Court Justice Rabinowitz in his dissenting opinion wrote:

> "[I] dissent from the majority's holding that the applicable statute of limitations "is not tolled until all appeals have been exhausted. *** [O]ur jurisprudence has de-emphasized the traditional policies advanced in support of statutes of limitations, namely, fairness to the defendant (notice). *** [W]e held in Shaw that in a legal malpractice action arising out of a criminal proceeding the statute of limitations for filing legal malpractice claims must be tolled until the criminal defendant obtains post-conviction relief. 816 P.2d at 1360. *** [T]o force malpractice plaintiffs to file their actions before they know the outcome of the case upon which their claim is based does not promote judicial economy. The status of the malpractice claim is uncertain until the appeal in the underlying case is resolved, because if it is ultimately decided in the client's

favor the malpractice suit may well become moot for lack of damages". *Id.* at 1286.

In *Zimmie v. Calfee, Halter and Griswold* (1989) 43, Ohio St.3d 54, 538 N.E.2d 398, the divided Ohio Supreme Court held:

> "[U]nder R.C.2305.11(A), a cause of action for legal malpractice accrues, and the one-year statute of limitations commences to run, when (1) there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney, or (2) the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later." (citations omitted).

In his dissenting opinion Justice Sweeney wrote:

> "[I] believe that fairness, as well as a certain sense that the judicial system will arrive at the correct and just result, compels a finding that a legal malpractice action should not accrue until the appellate process has run its course *** The majority opinion herein does not enlarge access to the courts in the manner that the aforementioned cases do; it merely encourages a clogging of court dockets with actions that may very well be baseless." *Id.* at 403, 404.

In his dissenting opinion Justice Herbert R. Brown wrote:

> "[T]wo requirements must be met to apply the statute of limitations as a time bar to a malpractice action. First, the requisite time must have elapsed following the injury to the plaintiff. Second, the requisite time must have elapsed following a cognizable event leading to the discovery of that injury." *Id.* at 405.

In his separate concurring opinion in *Allen v. D. Murph* 194 F.3d 722 Circuit Judge Krupanski of the U.S. Court of Appeals for the Sixth Circuit (interpreting the "[actual] injury rule in *Zimmie* as "judgment rule") advised the Murphs (who, in this suit unsuccessfully tried to recover attorney fees from a case their former lawyer had won for them, but then failed to apply for attorney fees) as follows:

> "[B]cause the Murphs have, to this date, been confronted only with a *potential* financial loss which will not materialize into actual injury or loss, depending upon the final disposition of an appellate review of the magistrate's decision by this court or the United States Supreme Court, the Ohio legal malpractice limitations statute, pursuant to the dictates of the Ohio Supreme Court in *Zimmie, supra,* is tolled until an appellate review of the instant appeal has been finally concluded. *** However, should the instant appeal affirm the magistrate's ruling, the petitioners will, for the first time, suffer an actual injury or loss, as defined in *Zimmie*. *** [A]nd therefore the Murphs' time limitation within which to file their malpractice claim against their legal counsel does not begin to accrue until the petitioners have suffered actual injury in the form of financial losses which will be cognizable for the first time

> under *Zimmie* upon a final disposition of the current appellate review." *Id.* at 729

In *Harris. v. Liston* (1999), 86 Ohio St. 3d 203; 714 N.E.2d 377 the Ohio Supreme Court confirmed its previous ruling on the discovery [of injury] rule.

In *FDIC v. Alexander*, 78 F.3d 1103 (1996) the U.S. Court of Appeals for the Sixth Circuit held:

> "[I]n determining when the "cognizable event" took place under *Zimmie*, a court must explore the facts of the case and determine when the injured party became aware, or should have become aware, of the extent and seriousness of his or her alleged legal problem; whether the injured party was aware, or should have been aware, that the damage or injury alleged was related to a specific legal transaction or undertaking previously rendered him or her; and whether such damage or injury would put a reasonable person on notice of the need for further inquiry as to the cause of such damage or injury. *Omni-Food & Fashion, Inc. v. Smith,* 38 Ohio St.3d 385, 528 N.E.2d 941, 944-45 (1988). *** Under *Zimmie,* for purposes of the accrual of a legal malpractice claim, an attorney-client relationship ends "when the attorney-client relationship for that particular transaction or undertaking terminates." *Zimmie*, 538 N.E.2d at 401 (citing Omni-Food & Fashion, 528 N.E.2d at 942). *** That court also stated that "the question of when an attorney-client relationship for a particular undertaking or transaction has terminated is necessarily one of fact." *Id.* Requiring that an external event trigger a plaintiff to investigate a potential malpractice action is

> consistent with other Ohio malpractice cases. See *Zimmie v. Calfee, Halter and Griswold*, 43 Ohio St.3d 54, 538 N.E.2d 398, 402 (1989) (in legal malpractice action, cognizable event occurred when trial court invalidated plaintiff's antenuptial agreement); *Koch v. Gross,* 64 Ohio App.3d 582, 582 N.E.2d 51, 54 (1990) (holding that cognizable event occurred when the plaintiff was advised of the legal malpractice by her new attorney*); Herr v. Robinson Memorial Hosp.*, 49 Ohio St.3d 6, 550 N.E.2d 159, 162 (1990) (cognizable event occurred when new doctor informed the plaintiff that he previously had been misdiagnosed); *Tober v. Kaiser Found. Hosps.*, 79 Ohio App.3d 333, 607 N.E.2d 469, 473 (1992) (same)." *Id* at 1111

In *Woodruff v. Tomlin,* 511 F.2d 1019, 1020-21 (6th Cir.1975), mem. decision on remand, 423 F.Supp. 1284 (W.D.Tenn.1976), rev'd, 593 F.2d 33 (6th Cir.1979), aff'd in part, rev'd in part en banc, 616 F.2d 924 (6th Cir.1980), cert. denied, 449 U.S. 888, 101S.Ct. 246, 66 L.Ed.2d 114 (1980). the U.S. Court of Appeals for the Sixth Circuit (applying Tennessee law) ruled:

> "[T]hat the limitations period did not begin to run until the appellate process had concluded. The relationship of attorney and client did not end on the date of the oral argument; it certainly continued until after the Court of Appeals decided the case. Until the case was finally terminated and a final judgment rendered the plaintiffs could not prove damage, because the Court of Appeals might have granted a new trial, and on retrial a different result could possibly have occurred." 511 F.2d at 1020.

2. The U.S. Court for the Sixth Circuit has decided an important constitutional question by importing into the circuit a state court ruling disallowing clients to sue their former attorneys for breach of contract.

The District Court's finding that Petitioner

> "[s]eeks to asserts claims for breach of a [written] contract, breach of fiduciary duty, and fraud"

cannot be reconciled with the District Court's decision that.

> "[A]lthough [Omlin's] complaint alleges breach of contract, there is no question that the gist of [her] complaint is for legal malpractice subject to the one year statute of limitations in R.C. § 2305.11(A)."

This decision is not supported by any state statute but is based on the intermediate state court's ruling in *Muir v. Hadler Real Estate Mgmt. Co.*, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982):

> "[A]n action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or direct damages. *** [m]alpractice by any other name still constitutes malpractice *** "[U]nprofessional misconduct may consist either of negligence or the breach of contract of employment. It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice

> statute of limitations set forth in R.C. 2305.11 is applicable." *Id.*at 822.

In fact, the state statute regulating the practice of law in the State of Ohio provides in Section 4705.15(A)(2) of the Revised Code:

> "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for breach of contract or another agreement between persons."

The *Muir* court decision: (1) constitutes the impairing of a private contract by the State of Ohio through its judicial branch and is in conflict with the Contract Clause, providing:

> "[N]o State shall .... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts..."

and (2) creates two classes of people (the class of attorneys /law firms who cannot be sued for breach of contract but can sue their clients for breach of contract, and the class of clients who can be sued for breach of contract, but cannot sue their attorneys / law firm for breach of contract) and is in conflict with the Equal Protection Clause, providing:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Johnson v. Railway Exp. Agency*, 421 U.S. 454, 95 S.Ct. 1716 the concurring/dissenting opinion referred to *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) as follows:

> ".***[w]e concluded that Congress intended to prevent private discriminatory deprivations of all the rights enumerated in § 1 of the 1866 Act, including the right to contract. 392 U.S., at 426, 88 S.Ct. at 2195. The Court's recognition of a proscription in § 1981 against private acts of employment discrimination, ante, at 1719, 1720, reaffirms that the early Civil Rights Acts reflect congressional intent to 'speak . . of all deprivations . . . whatever their source.' " (citations omitted). *Id.* at 1725.

When finding that a "breach of contract" falls into "the manner in which the attorney represented the client", the *Muir* court ignored the fact that when signing a contract with his client the attorney neither represents the client nor the client's interest, but himself and his own interests, and when the attorney signs a contract on behalf of a law firm, he represents the law firm and its interests.[2]

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[2] Ohio Revised Code § 2305.06 Except as provided in sections 126.301 [126.30.1] and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

§ 126.03 Director to prepare capital plan and budget; agency recommendations.

§ 1302.98 (UCC 2-725) Statute of limitations in contracts for sale: (A) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the

The *Muir* Court also ignored that a law firm can have contractual obligations, as in this case, in addition to the professional duties of an attorney. In *McCourbey v. Kellogg* (2001) 246 F3d 666, the U.S. Court of Appeals for the Fourth Circuit recognized that a legal malpractice may sound in either tort or contract depending on the context.

Westlaw© reports 38 cases in which state courts of appeals used the *Muir* rule. Attorneys and law firms (and the insurance companies they represent) have no interest to challenge a decision that grant them immunities which might

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period of limitation to not less than one year but may not extend it.

§ 2305.012. A cause of action shall be considered to accrue for all purposed as determined by the statute of limitations that applies to that cause of action.

§ 2307 Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon contract not in writing, express or implied, or upon liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

§ 2305.08 If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time limited by sections 2305.06 and 2305.07 of the Revised Code, after such payment, acknowledgment, or promise

§ 2305.09 An action for any of the following causes hall be brought within four years after the cause thereof accrued: (A) For trespassing upon real property; (B) For the recovery of personal property, or for taking or detaining it; (C) For relief on the ground of fraud; (D) for an injury to the rights of plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305,12, 2305.14 and 1304.35 of the Revised Code.

explain that the *Muir* decision has not yet been before the Ohio Supreme Court.

3. The courts below did not consider Petitioner's properly amended complaint, the court certified copies of state courts' proceedings and her opposing affidavit supported by copies of the business record.

Fed. R. Civ. P. 56(c) provides:

> "***The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ***"

Citing *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Circuit 1989) that

> "[T]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact",

and requiring that according to *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992)

> "[T]he non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact."

the District Court leaves open what a non-moving party can do more to satisfy these requirements than file a timely opposing pleading, cite therein the papers presented as evidence and point to the relevant number of the supporting exhibits. (Appendix B)

> Relying on *Street* the District Court, to Petitioner's prejudice, exclusively received the facts from the brief of the moving party, no matter if they were supported by evidence or not. Specifically, the district court did not consider Respondent's letter of January 8, 1998 (Appendix F.R. 39; Opposing Affidavit, Exhibits B 34-35) giving the false legal advice and creating along with the presented invoices (both documents numbered as exhibits and referred to in Petitioners opposition to Respondent's motion for summary judgment) a genuine issue of fact when the statute of limitations began to run.

In *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 528 N.E.2d 941) the Ohio Supreme Court held:

> "The question of when an attorney-client relationship for a particular undertaking or transaction has terminated is necessarily one of fact." *Id* at 944.

The *Street* and the *Fulson* rulings are in conflict with this Court's ruling in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (when ruling on a Rule 56 motion, "the court must review all of the evidence in the record"), and with *Lytle v. Household Mfg. Inc*, 494 U.S. 545, (drawing all "reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence". *Id.* at 554-555.)

Street and the *Fulson* are also in conflict with this Court's ruling in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 that "(c) redivility determinations, the weighing of the evidence, and the drawing of the legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Id.* at 255.

The disregard of Petitioners properly amended complaint is in contradiction with decisions of this Court considering amended complaints. *See e.g.: Hospital Bld. Co. v. Rex Hospital Trustees,* 4225 U.S. 738 (1976); *Wallace v. Jaffree*, 466 U.S. 924 (1984); *Ashcroft v. Mattis*, 431 U.S. 171 (1977); *Gould, Inc. v. Adams*, 469 U.S. 1122 (1985);

Another open issue is, if under Article IV Section of the Constitution of the United States and on the Full Faith and Credit Act, 28 U.S.C. 1738, court certified copies of the state judgments are considered to be a material specified under Fed. R. Civ. P. 56(c).

In *Baker v. General Motors Corporation*, 477 U.S. 242; 106 this Court held:

> "4. The first Congress enacted the original Full Faith and Credit statute in May 1790. See Act of May 26, 1790, ch. 11, 1 Stat.122 (codified as amended at 28 U.S.C. § 1738) ("And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."). Although the text of the statute has been revised since then, the command for full faith and credit to judgments has remained constant."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Gabriele Omlin
15 Hirzbodenweg
Basel, CH-4052
Switzerland
Petitioner *pro se*

September 26, 2001

APPENDIX

APPENDIX A

Nos. 00-4003/4142
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. this notice is to be prominently displayed if this decision is reproduced.

Entered on
May 01, 2001

GABRIELE OMLIN
Plaintiff-Appellant
v.
KAUFMAN & CUMBERLAND COMPANY, L.P.A.,
Defendant-Appellee

ORDER

Before: BOGGS and CLAY, Circuit Judges; ROBERTS, District Judge. *

Gabriele Omlin, a pro se resident of Switzerland, appeals a district court order dismissing her civil action filed pursuant to 28 U.S.C. § 1332(a)(2) and a district court order denying her an extension of time so this court could review a non-final order. This case has been referred to a panel of the

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* The Honorable Victoria A. Roberts, United States District Judge for the Eastern District of Michigan, sitting by designation.

court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary relief, Omlin sued the law firm of Kaufman & Cumberland contending that: 1) work performed for her was below the minimum standard of care; 2) the law firm did not comply with its duty to engage in proper discovery; and 3) the firm made false representations for the purpose of inducing her to enter into a representation agreement. The district court subsequently granted summary judgment to Kaufman & Cumberland concluding that Omlin's complaint was barred by Ohio's applicable statute of limitations.

In her timely appeals, Omlin argues that the district court should not have granted summary judgment to Kaufman & Cumberland as genuine issues of material fact existed; that the district court erred in ignoring her amended complaint; that the district court should not have construed her complaint as an action for breach of contract, breach of fiduciary duty, and tort claim; and that her complaint was not barred by the applicable statute of limitations.

The court reviews the district court's orders de novo. *See Allen v. Michigan Dept. of Corr.*, 165 F.3d 405, 409 (6th Cir. 1999). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. When reviewing a motion for summary judgment, the court must view the evidence and any inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Id.*

Omlin's complaint is barred by Ohio's one-year statute of limitations. Under Ohio law, the statute of limitations for a legal malpractice action is one year. Ohio Rev. Code §

2305.11(A)(1). In *Zimmie v. Calfee, Halter & Griswold,* 43 Ohio St. 3d 54, 538 N.E.2d 398, 401 (Ohio 1989), the court stated that the statute of limitations:

> begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

In this case, termination of the attorney-client relationship is the later event. Omlin's alleged injuries, which placed her on notice of a possible need to pursue remedies against Kaufman & Cumberland, was when she perceived "mistakes in lawyering." Omlin learned of these mistakes, at the latest, on January 5, 1998, when she sent Kaufman & Cumberland her notice demanding that the firm "correct your mistakes" or withdraw as counsel. The termination of Omlin's attorney-client relationship with the firm occurred the next day on January 6, 1998, when Omlin directed Kaufman & Cumberland to advise the courts, "that at my request you are withdrawing as counsel effective immediately."

An attorney-client relationship is not continued or extended, for the purposes of running the statute of limitations, by the amount of time it takes the attorney to withdraw as counsel. *See Wozniak v. Tonidandel,* 121 Ohio App. 3d 221, 699 N.E.2d 555, 558-59 (Ohio Ct. App. 1997). As Omlin terminated her relationship with Kaufman & Cumberland on January 6, 1998, the one-year statute of limitations on her claim began to run on this date. Thus, Omlin was required to bring any malpractice claim against Kaufman & Cumberland on or before January 6, 1999. However, Omlin did not file her

complaint until January 8, 1999. Thus, Omlin's action is time barred.

Although Omlin argues that this action was not a malpractice action, but a breach of contract, breach of fiduciary duty, and tort action, an "action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages." *Muir v. Hadler Real Estate Mgmt. Co.*, 4 Ohio App. 3d 89, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982). The *Muir* court noted that: "malpractice by any other name still constitutes malpractice . . . . [M]isconduct may consist either of negligence or of the breach of the contract of employment. It makes no difference whether the professional misconduct is found in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." *Id.* Thus, Omlin's attempt to characterize her action as something other than a legal malpractice proceeding is without merit.

Omlin contends that the district court ignored her amended complaint and that genuine issues of fact prevent the granting of summary judgment to Kaufman & Cumberland. Despite Omlin's arguments, the undisputed facts establish that her attorney-client relationship with Kaufman & Cumberland terminated on January 6, 1998. However, she did not file her complaint until January 8, 1999. Therefore, the action is barred.

Finally, Omlin has appealed the district court's order denying her an extension of time to appeal a non-final order. An appeal from a final judgment draws into question all prior non-final rulings and orders. *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1096 (6th Cir. 1994). As Omlin has appealed the district court's final judgment, the district court's prior denial of Omlin's motion to strike is properly before this court. *Id.*

Therefore, the second notice of appeal is duplicative. In addition, as Omlin's complaint is barred by the applicable statute of limitations, the motion to strike was properly denied.

Accordingly, we affirm the district court's orders. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Entered on
July 5, 2000

GABRIELE OMLIN
Plaintiff
v.
KAUFMAN & CUMBERLAND CO., L.P.A.
Defendant
Case No. 1:99CV00047
Judge O'Malley

Plaintiff Gabriele Omlin, a citizen of Switzerland, brings this action pro se against her former Cleveland, Ohio lawfirm, Kaufman & Cumberland Co. ("K&C"). In her complaint, Omlin alleges that: (1) then work performed by K&C "was below the minimum standard of care", complaint at §4; (2) K&C "failed to comply with [its] fiduciary duty to do the proper discovery work", id. at §5; and (3) K&C made "false and fraudulent" misrepresentations to her, "for the purpose to inducing (her) to enter into a representation agreement" id. at § 8. In her complaint, Omlin does not separately set out her claims; a fair reading of the complaint, however, suggests she

claims; a fair reading of the complaint, however, suggests she seeks to assert claims for breach of contract and fraud.[1] The Court has diversity jurisdiction over this action, pursuant to 28 U.S.C. § 1§332(a)(2).

K&C has filed a motion for summary judgment (docket no. 37), and Omlin has filed a cross-motion for summary judgment (docket no. 42). For the reasons stated below, K& C's motion is GRANTED, Omlin's motion is DENIED, and this case is DISMISSED.

The following material facts are not in dispute. Omlin's initial contact with K&C occurred on August 2, 1996, when se met with attorney Frank Cumberland. Omlin asked Cumberland to represent her in connection with a legal dispute she had with her landlord[2]. The landlord had already obtained a $ 1,000.00 judgment against her in Willoughby, Ohio Municipal Court, and shed wanted then judgment vacated or reversed (the "Willoughby Case"). Unfortunately for Omlin,, when she first met with Cumberland, the time within in which to file a timely appeal of the Willoughby Case trial court judgment had already expired. K&C explained this to Omlin, but she was insistent on pursuing an appeal anyway; she urged K&C to argue on appeal that the Hague Convention allowed her additional time. K&C decided it would represent Omlin, so on September 5, 1996, Cumberland sent Omlin a "Letter of engagement", setting out the terms of their agreement. On September 12, 1996, Omlin signed the letter, agreeing to its terms.

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[1] Reading the complaint charitably, Omlin seeks to assert a claim for negligent or intentional infliction of emotional distress. See complaint at § 10 ("(a)s a direct and proximate result of (K&C's) misrepresented competence, their breach of contract, their breach of fiduciary duty, their negligence, their misleading legal advice and misleading status reports, Appellant ... incurred not only monetary loss, but also mental anguish, pain and suffering")."

[2] Omlin lived in Willoughby, Ohio for about a year, but has since returned to her home country.

K&C proceeded to pursue Omlin's interests on two different fronts. First, with regard to the $1,000.00 judgment, K&C filed a direct appeals of the Willoughby Case, as Omlin had requested, Second, K&C filed a complaint, on Omlin's behalf, against her ex-landlord, asserting claims for breach of contract, invasion of privacy, fraud/misrepresentation, negligence, and breach of the Ohio Landlord-Tenant Act (the "Cuyahoga Case"). Later, K& C also filed a motion for relief from judgment with the trial court in the Willoughby Case.[3] On December 10, 1996, the state appellate court in the Willoughby Case rejected Omlin's resort to the Hague Convention and dismissed the appeals as untimely. On October 10, 19997, the trial court denied the motion for relief from judgment. Pursuant to Omlin's direction, on November 7, 1997, K&C filed an appeal of the trial court's denial of the motion for relief from judgment in the Willoughby Case.

K&C began work on the Willoughby Case appellate brief. While doing so, Omlin gave K&C a lot of direction regarding the content she wanted in the brief. Early in December of 1997, Omlin suggested she wanted to withhold payment for legal fees until she could read and approve the contents of the appellate brief. K&C refused this arrangement because of the difficulty in coordinating with Omlin who was in another country, and Omlin relented. On January 2, 1998, K& C filed Omlin's brief with the state court of appeals. Three days later, on January 5, 1998, Omlin sent a fax to K&C, which stated:

> I am frustrated by the mistakes in your lawyering, your refusal to apply the Landlord-Tenant Law, and the unsuccessful results. I, therefore, herewith request you:

[3]The motion for relief from judgment in th Willoughby Case was premised on evidence obtained during discovery in the Cuyahoga Case, which seemed to contradict evidence the landlord had submitted at trial in the Willoughby Case.

(a) either try to correct your mistake by following up the appeal on your own costs or
(b) to withdraw as counsel from the Willoughby case as well as the Cuyahoga case.

Please let me have your decision on this by fax tomorrow.

K&C replied the following day, January 6, 1998, stating that it would withdraw as counsel from both cases. K&C also suggested option Omlin could pursue to protect her interests in the two pending cases, adding the statement that, [y]ou must give us specific written instructions of how you wish to have us proceed." Omlin responded the same days, asking K&C to advise the courts in both cases "that at my request you are withdrawing as counsel effective immediately." Omlin added that she would "obtain replacement counsel who will appear on my behalf"

On January 9, 1998, Omlin related to K&C that she had obtained Mr. Rossi as replacement counsel. K& C filed a motion to withdraw In the Cuyahoga Case on January 12, 1998; Mr. Rossi appeared at a case management conference in the Cuyahoga Case on January 14, 1998; and the court granted K&C's motion to withdraw on February 2, 1998. K&C also filed a motion to withdraw in the Willoughby Case, the state appellate court granted this motion on February 19, 1998.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the

> moving party is entitled to judgment as a matter of law.

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations nor denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file Celotex Corp. v. Catrett, 477.U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. Adickes v. S.H. Kress Co., 398 U.S. 144 (1970); White v. Turfway Park Racing Ass'n. Inc. 909 F.2d 941, 943-

44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing suffient ot establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 332. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Circuit 1989) (citing Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact" Fulson v. City of Columbus, 801 F. Supp. 1,4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. Id.

In its motion for summary judgment, K&C presents to arguments: (1) Omlin's action is barred by the statute of limitations; and (2) Omlin presented no issue of material fact regarding whether K&C breached any duty it owed to her.[4] Because the Court finds the first of these arguments both

[4] The latter argument is premised, in part, on the fact that Petitioner's own expert failed to find Respondent breached any duty it owed her as counsel.

persuasive and sufficient, it does not reach the second argument.[5]

In Ohio, the statute of limitations for a legal malpractice action is one year. Ohio Rev. Code § 2305.11(A)(1). Zimmie v. Calfee, Halter & Griswold, 43 Ohio St. 3d 54, 538 N.E.2d 398, 401 (Ohio 1989). The limitations period

> begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Zimmie, 538 N.E.2d at 401. In this case, the second event is the later one.. Omlin's alleged injuries, which put her on notice of a possible need to pursue remedies against K&C, were K&C's perceived "mistakes in lawyering." Omlin learned of these mistakes, at the latest, on January 5, 1998, when she sent K&C her ultimatum, demanding that K&C "correct its mistakes" or withdraw as counsel. Thus the termination the attorney-client relationship, itself, was the event triggering the running of the limitations period.

The termination of the Omlin's attorney-client relationship occurred on January 6, 1998, when Omlin directed

[5] The Court has some sympathy for Omlin, but only to the extend that there is evidence that she was treated badly by her landlord, who - despite treating her badly - succeeded in obtaining a $1,000.00 judgment against her. Nonetheless, the Court alos notes that Omlin received fair warning from K&C that her chances of success were slim, and that the cost of representation was sure to exceed any monetary benefit. The problems that flow from Omlin's insitence that she wanted to pursue the Willowghby Case and the Cuyahoga Case despite the substantial cost, in order to vindicate herself "on principle", are of her own making.

K&C to advise the courts, in both the Cuyahoga Case and the Willoughby Case, "that at my request you are withdrawing as counsel effective immediately." An attorney-client relationship is not continued or extended, for limitations purposes, by the amount of time it takes the attorney to withdraw as counsel. See Erickson v. Misny, 1996 WL 239883 at *5 (Ohio Ct. App. May 9, 1996), appeal disallowed, 673 N.E.2d 142 (Ohio 1996) (rejecting arguments that, after the client obtained new counsel, the prior attorney-clientship nonetheless continued, until the prior attorney filed his notice of withdrawal or until the prior attorney returned the client's file); Wozniak v. Tonidandel, 699 N.E.2d 555, 559 (Ohio Ct. App. 1997), appeal disallowed, 685 N.E.2d 237 (Ohio 1997) ("Plaintiff's argument that [his attorney's] representation lasted until the court granted his motion to withdraw is meritless. This court recently rejected this very argument and held that in a statue of limitations context the conduct of an attorney can terminate an attorney-client relationship prior to the filing of the notice of withdrawal.) (citing Misny).

Omlin's unequivocal termination of her relationship with K&C on January 6, 1998, triggered the start of her one-year limitations period. Thus, Omlin was required to bring any malpractice claim against K&C on or before January 6, 1999. She filed this action on January 8, 1999. Accordingly, her action is time-barred.

In her opposition to K&C's motion for summary judgment, Omlin argues that this action is "not a malpractice action, but a breach of contract claim." Opposition brief at 4. Omlin asserts, accordingly,, that the applicable limitations period is 15 years, not one year. See Ohio Rev. Code §2305.06 (providing that the applicable limitations period for bringing an action on a written contract is 15 years).

Case law makes it clear, however, that "[i]n Ohio the applicable statute of limitations is determined not from the form of pleading or procedure, but from the gist of the

complaint." Ward v. Lynch, 1995 WL 723299 at *3 (Ohio Ct. App. Dec. 7, 1995). An "action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages."Muir v. Hadler Real Estate Mgmt. Co., 446 N.E.2d 820, 822 (Ohio Ct. App. 1982) (citations omitted). The Muir court continued: "[m]alpractice by any other name still constitutes malpractice . . . .[U]professional misconduct may consist either of negligence or of the breach of the contract of employment. It makes no difference whether the professional misconduct is found in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." Id.

In this case, [a]lthough [Omlin's] complaint alleges breach of contract, there is no question that the gist of [her]complaint is for legal malpractice subject to the one year statute of limitations in R.C. §2305.11(A)". Lynch, 1995 WL 723299 at *3. Because she did not file her complaint in this case until after the limitations period had ended, K&C is entitled to summary judgment, as a matter of law.

IT IS SO ORDERED.

/s/
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

00-4003/4142
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Entered on
June 29, 2001

GABRIELE OMLIN
Plaintiff-Appellant
v.
KAUFMAN 6 CUMBERLAND COMPANY, L.P.A.
Defendant-Appellee

ORDER

Before: BOOGS and CLAY, Circuit Judges; and
ROBERTS, * District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and the decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

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* Hon. Victoria A. Roberts, United States District Judge for the Eastern Division of Michigan, sitting by designation.

APPENDIX D

UNITED STATES DISTRIC COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action, File Number _____

Filed 99 Jan-8 PM 2:39
Clerk U.S. District Court
Northern District of Ohio
Case No. 1:99CV0047
Judge Kathleen O'Malley
Mag. Judge Perelman

GABRIELE OMLIN
Plaintiff
v.
KAUFMAN & CUMBERLAND CO., L.P.A.
Defendant.

COMPLAINT
(Jury Demand Endorsed Hereon)

1. Plaintiff is a citizen and resident of Switzerland and defendant is an association of law practicing attorneys incorporated under the laws of the State of Ohio having its principle business in Cuyahoga County in the Eastern Division of the Northern District of Ohio.

2. On or about August 2 of 1996, plaintiff contacted Mr. Frank Cumberland seeking legal advise in a landlord/ tenant matter resulting from a lease when plaintiff was a resident in Ohio. Mr. Cumberland assured he has a long-standing experience in the real estate areas as well as in

international law and that he was able to take over the matter himself. On or about September 5, 1996 parties signed a representation agreement confirming that Mr. Cumberland would provided then offered and accepted services in a timely and competent manner himself, occasionally assisted by others (See Exhibit attached.)

3. Kaufman & Cumberland Co. L.P.A. breached this agreement and turned the matter over to legal intern, inexperienced junior associates and non-legal support staff and changed them frequently.

4. The work performed by the staff was below the minimum stand of care. None of the staff was ever fully briefed on the facts nor experienced or competent enough to apply the appropriate laws and rules of procedure and to make proper conclusions on laws and facts.

5. In addition to their negligent conduct Kaufman & Cumberland Co. L.P.A. failed to comply with their fiduciary duty to do the proper discovery work on behalf of the plaintiff. They withheld witnesses named by plaintiff and evidence supplied to them by plaintiff with the explicit instruction to present the papers in court. They declined a settlement without informing plaintiff. They failed to transmit to plaintiff interrogatories.

6. In all their activities Kaufman & Cumberland put their interest to produce work for their junior and non-legal staff ahead of the plaintiff's interest and ahead for their duty to perform timely, competent legal work. This amounted to a dismissal of an appeal because they failed to cite authorities and raise arguments in time, a dismissal of an filed Rule 60(B) motion, a dismissal of a tort action (advised and filled by them) for res judicata reasons.

7. Their negligence amounted not only into the exorbitant fees but produced legal problems. After plaintiff has paid a total of approximately 37,000 Dollars into their trust account, but has not received any usable work, plaintiff told

Kaufman & Cumberland that she would no longer pay for their unprofessional work - under the Consumer Protection Act - and requested that they correct the mistakes caused by their staff on their own expense and by Mr. Cumberland himself. In response they blackmailed plaintiff that they would not file and appeal brief due if plaintiff would not send, by overnight priority mail, another 25,000 Dollar check. Plaintiff paid 10,000 Dollars and finally Kaufman & Cumberland filed the brief. This brief was complied by non-legal staff from two other unsuccessful briefs, failed to state that a municipal court does not have jurisdiction to issue injunctions and failed to cite authorities. On December 14, 1998 this appeal has been again dismissed.

8. Mr. Cumberland's representations were false and fraudulent. He made them knowingly and intentionally for the purpose of inducing plaintiff to enter into a representation agreement and he knowingly and intentionally breached the contract for the purpose to producing billable hours for his junior and non-legal staff and for the purposed of unjustified enrichment.

9. As a direct and proximate result of Kaufman & Cumberland's misrepresented competence, their breach of contract, their breach of their fiduciary duty, their negligence, their misleading legal advise and misleading status reports, plaintiff Gabriele U.C. Omlin incurred expenses to redo their work, international traveling and phone calls in the amount of approx. 150,000 Dollars. In addition, plaintiff will never be able to refile the tort action mishandled by Kaufman & Cumberland and will never be able to collect any of the 529,121.7773 Dollars sought in this tort claim.

10. As a direct and proximate result of Kaufman & Cumberland's misrepresented competence, their breach of their fiduciary duty, their negligence, their misleading legal advice and misleading status reports, plaintiff Gabriele U.C. Omlin incurred not only monetary loss, but also mental anguish, pain and suffering.

11. As further direct and proximate result of Kaufman & Cumberland's misrepresented competence, their breach of their fiduciary duty, their negligence, their misleading legal advice and misleading status reports, plaintiff Gabriele U.C. Omlin has and will incur litigation expenses and attorney fees.

WHEREFORE, Plaintiff demands relief as follows:

1. Judgment against Defendant;
2. An award of special damages in excess of $400,000;
3. An award of compensatory damages for the lost prospective compensation on the tort action in the amount of $529,121.73;
4. Punitive damages in the amount of $500,000;
5. Attorneys' fees and all costs associated with this litigation; and
6. Any and all other relief this court deems just and equitable.

Respectfully submitted,

/s/_____
GABRIELE U.C. OMLIN

APPENDIX E

Letter from: KAUFMAN & CUMBERLAND
1402 East Street, Cleveland Ohio 44114
To: Ms. Gabriele Omlin
Hirzbodenweg 15, CH-4052 Basel,
Switzerland

September 5, 1996

Dear Ms. Omlin:

We are pleased that you have retained Kaufman & Cumberland Co. L.P.A., to represent you in the above-referenced matter. This letter will constitute an agreement between Kaufman & Cumberland Co. L.P.A. ("Kaufman & Cumberland") and Gabriele Omlin ("Client") regarding the terms of which Kaufman & Cumberland will provide legal services for Client. We ask that you read this letter carefully to understand the terms of our representation.

All Firm attorney, paralegals and law clerks are assigned hourly rates and keep detailed records of their time in units not less than tenths of an hour. Each such unit is based upon actual work performed on your case. Such time may be spent on telephone calls relating to your legal matters, including calls with you or opposing counsel; writing letters; doing research; preparing legal documents; conducting negotiations; appearing in court; engaging in meetings or other similar matters.

The legal personnel assigned to your case may confer among themselves about the matter, as required. When they do confer, each person will charge for the time expended. These meetings only occur when it is important that information be shared or when supervision or direction is necessary. Likewise, when it is beneficial to you for more than one of ourlegal

personnel to attend a meeting or other proceeding, each will charge for the time spent.

My hourly rate for this matter will be One Hundred Ninety-five Dollars ($195.00). A schedule of the rates of other professionals in the Firm is attached to this letter. We endeavor to assign work to the lowest-cost person capable of providing the required service in a timely, competent manner. This means that occasionally, I will be assisted by others with whom you may have direct contact, including legal assistants. We believe that such direct contact is essential in order to avoid duplication of effort and miscommunication. These expenses include, but are not limited to, copying charges, facsimile (fax) transmission charges, secretarial overtime, travel expenses, courier delivery, Lexis© or Westlaw© (computer assisted research) charges, fees paid to court reporting services, filing fees and other similar expenses. A schedule of charges for certain of our in-house expenses is attached to this letter. Any such cost will only be incurred in furtherance of your case and with respect to significant expenses, such as expert witness fees, only with your permission (except in the event of expenditures which must be made on an emergency basis in order to protect your interests).

We will bill you on a monthly basis. Our invoices will state the total amount due for services rendered and expenses provided to you during the billing period. Each invoice will be accompanied by a detailed description of the specific services rendered and the date on which such services were rendered. All invoices for services rendered are due within thirty (30) days of the invoice date. Any invoices not paid within thirty (30) days of receipt shall accrue interest at a rate of 0.83 percent (.83%) of the outstanding balance per month, compounded.

It is our Firm policy that if any statement remains unpaid for a period of sixty days after issuance, we reserve the right to cease work on the matter until the delinquency has been

rectified or acceptable arrangements made for payment of the past due balance.

While we are constantly striving to maintain our fees at their current levels, our hourly rates may, from time to time, have to be increased. This may occur if there is any significant span of time which elapses during the course of our representation. We can assure you, however, that if and when such increases occur, you will be notified in advance of the increase. Changes in hourly rates will be effective for time charged after the effective date of the change.

Because of the considerable amount of time which will be initially invested in your case, and in line with Firm policy, we have requested a retainer of Five Thousand Dollars ($5,000.00). Your money order in the amount of $5,000.00 was received by our office on August 22, 1996. The retainer shall be applied against charges on your account. The current status of your retainer will appear on each bill you receive. We may require additional retainers in the future to be applied in a similar manner.

After you have reviewed the foregoing, we would appreciate your acknowledgment of receipt of this letter and agreement with its terms by signing a copy of this letter and returning it to our office at your earliest convenience. We have already opened a file and will take whatever steps are necessary to protect your interests in the interim, but must have an executed copy of this letter in our files, in any event.

We are pleased to present you in this matter and I assure you that we will pursue the matter diligently and expeditiously.

Very truly yours,

/s/_____
Frank J. Cumberland

I accept the foregoing arrangements for legal representation by Kaufman & Cumberland Co. L.P.A.

/s/ _____
GABRIELE OMLIN
Basel, Sept. 12, 1996

FJC/lgc

APPENDIX F

Letter from: KAUFMAN & CUMBERLAND
1402 East Street, Cleveland Ohio 44114
To: Ms. Gabriele Omlin
Hirzbodenweg 15, CH-4052
Basel, Switzerland
January 8, 199

Dear Gabriele:

Thanks for your fax of January 6, 1998. We understand, and agree with, your New Year's resolution to move on to other things. We also have to admit that we agree with the advice you received from your friend in Boston - you will have a much less stressful year if you stay away from U.S. attorneys. We sincerely trust that you do not lay the responsibility for the stress you feel over the Ursettis, Dan Taylor an Judge Allen at our feet. Believe it or not, we have and continue to be, firmly on your side, and deeply committed to advancing your interests in the best way we know.

Having said all this, there are still a few loose ends we would like to tie down for you. First, the Court of Appeals granted our request for oral argument. We just learned of this. It does not make sense for you to have another attorney come in and get up to speed for this proceeding, and it will be very prejudicial if you have someone appear for you, not fully prepared. A bad oral argument will almost certainly guaranty a loss for you, and the odds are already against you. We therefore ask you that you allow one of us to do this argument on your behalf. You can pay us for the time, or not, as you see fit. Since oral argument is the only thing left.

On the Cuyahoga County case, we still recommend that you allow us to file a voluntary dismissal, rather than withdraw. The dismissal will be, as Dave explained in a previous letter to you, *without prejudice*. This means you will

have one full year to reconsider your position, get whatever tests you want or need, and then decide whether to pursue the matter. Rule 41 allows you to do this; the running of the statute has no application. The choice is yours, but if you really to want to stay away from lawyers this year, a voluntary dismissal without prejudice is the best way to do that.

Given this options, please let us know how you wish to have us proceed. We will of course honor your request to withdraw from both cases immediately if that is still your desire, but we would prefer to at least finish that which we have started. We will wait for your decision.

We, like you, have no adverse or bad feelings over this matter other than the obvious. Our clients often become emotionally involved in their cases, which requires at times that we take strong positions. Dealing with that is part of our job. We also respect your need to "have some time out"; after a reasonable break, we can discuss how to handle your outstanding balance with the firm. As your "escrow agent," I will also need instruction concerning the two Swatch watches in my safe. I have spoken with Dave who assures me that he is not at all reluctant to return the two he has, to keep the set together, and return them all to you.

We wish you a happy, healthy and stress-free New Year, Gabriele, and look forward to hearing from you.

Very truly yours,

/s/_____

FJC/mlb Frank J. Cumberland